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## ATTACK UPON THE JUDICIARY BECAUSE OF THE ENFORCEMENT OF SUNDAY LAWS.

While readers of the CENTRAL LAW JOURNAL are fully aware of our unequivocal stand against the expediency of sumptuary legislation, we, to the same extent, desire it to be understood that we are not in sympathy with those members of the bar who feel it to be their duty to throw the influence of their opinion against the proper judicial enforcement of such legislation and to drag such laws themselves into the mire of public contempt.

Our reason for adverting to this question at this time is the attitude of the press and certain members of the bar of Kansas City, Missouri, censuring the action of Judge Wallace, of the circuit bench of that city, for especially charging the present grand jury to investigate violations of the Sunday closing law and to return indictments for such violations if they found that there were any such violations.

A great "storm of public indignation," as some of the opponents of Sunday closing put it, broke upon the head of the unfortunate Judge who started this inquiry into violations of a law which has been on the statute books for many years, unenforced, and for the repeal of which there was never any great public demand. Why should a judge be subject to any "storm of public indignation," and, especially, why should members of the bar join in any such censure, when the judge so vicariously sacrificed, is, as the representative of the sovereignty of the state, merely enforcing the will of the people of the whole state and standing by his oath in enforcing all the laws of the sovereignty which he represents without fear or favor. Here is one of the few instances where the American people in governmental affairs "play the fool," to-wit, in expecting public officials sworn to enforce all the laws, to "wink" at the violations of certain laws obnoxious to certain communities. Prosecuting officials and judges in our large cities, it is true, have been "winking" so often at violations of certain kinds of legislation that when a really honest, upright and capable official declares that he will be no respecter of persons or laws in the performance of his duties, he is looked upon as a monstrosity and is seriously charged with usurpation in office. If the matter had not such a serious phase to it we would relegate this entire discussion to our "Humor of the Law" column.

The serious reflection which comes forcibly to us from this incident, however, is the fact that if the people of any community are going to rise up and condemn members of the judiciary for performing their duties with rigid impartiality and absolutely without fear of consequences, the people will soon discover that competent men in the legal profession will refuse to enter public service. For instance, we knew of an exceedingly competent lawyer in a certain city who honored the circuit bench of that city with a judicial administration which brought confidence to the business and personal interests of every citizen of that city. A case happened to come before him in which the interests of a labor union were involved and in attempting to characterize the methods by which the union was endeavoring to enforce upon certain manufacturers the use of the union label, he declared that the adoption of the label under such circumstances would be a "badge of servitude" and severely arraigned the union for its unfair and unjust methods of enforcing its propoganda. There was here another "storm of indignation" and at the next election that judge, the greatest by long odds that ever sat upon the bench of that circuit was swept from his office as if he had been an usurper or public malefactor. This incident was regarded by the profession with acute distress and much foreboding.

We do not desire to consider here the propriety of enforcing Sunday legislation. Indeed, there is no room for that consideration to enter into the question of enforcing any laws upon the statute books. Suffice it to say, however, that the Supreme Court of the United States and many other appellate tribunals have held that such legislation is not in the interest of religion of any sect or sort, as is so often charged, but is purely a question connected with the public health an d

welfare, designed to give employees and others forced to work for their daily bread one day of rest for mental, physical and spiritual recuperation. This rule of law is so firmly settled that a reflection is cast upon a lawyer's knowledge of the law whenever in such cases he seriously objects to the enforcement of such legislation on the ground of sectarianism.

Let us have done once for all with these "storms of public indignation" against members of the judiciary who are honestly performing their duty and impartially enforcing the laws which the people themselves have made effective through their own representatives. If the public secular press cannot see the gross impropriety of such animadversions upon the judiciary, let the members of the American bar everywhere stand shoulder to shoulder with the judge who may be thus unjustly censured, demanding that the people shall recognize the dignity of the laws which they require the judge to enforce and that they show proper respect to those members of the profession who, forsaking the lucrative opportunities of a successful practice, engage to represent the people in the administration of one of the most important and most essential of the departments of every good government, to-wit, the fearless, impartial and just enforcement of all the laws of the land.

## NOTES OF IMPORTANT DECISIONS.

PARTNERSHIP—NO CONSIDERATION FOR PARTNERSHIP AGREEMENT BETWEEN PARENT AND MINOR CHILD.—Can a widow enter into partnership with her minor children? That was the interesting question presented in the recent case of Tuite v. Tuite, 66 Atl. Rep. 1090. In that case the bill is directed against the defendant, Mary J. Tuite, by her children, as plaintiffs, and charges that at the time of the death of Michael J. Tuite, husband of defendant, he was engaged in the junk business in Jersey City, which, at that time was worth about $3,000; that no letters of administration were taken out, but Delia, the eldest child, and Peter, the next eldest, took charge of the business, and conducted the same; that the business was profitable, and the income therefrom was invested in real estate in Hudson county, with the understanding and agreement that such real estate should be the joint property of the complainants and the widow Mary J. Tuite, but that for the purpose of convenience the title to all of such property should be and was taken in the name of Mary J. Tuite, she to collect the rents and income, and after paying the taxes and other expenses to divide the balance among the complainants and herself in equal proportions. The prayer for relief is that the defendant account as trustee and partner to the complainants for their share of the profits of the business.

The contention of the complainants was that there was a partnership agreement between them and their mother. The Court of Chancery of New Jersey, in denying the possibility of any such agreement that could be effective, said: "There was no possible consideration for such an agreement. The mother was entitled to the earnings of her children during their minority. Campbell v. Campbell, 11 N. J. Eq. 268 (Williamson, Ch., 1856); Osborn v. Allen, 26 N. J. Law, 388 (Sup. Ct. 1857); Furman v. Van Sise, 56 N. Y. 435, 15 Am. Rep. 441 (1874). And if they worked for her under her direction and control, they but did their duty to her, and there is therefore no possibility of importing any consideration into any such agreement as they allege was made. Upon the theory, therefore, that there was a partnership between the complainants and the defendant, I find that complainants could not succeed, even if they amended their bill by appropriate allegations to charge such an agreement."

## THE CONSTITUTIONALITY OF EMPLOYER'S LIABILITY ACTS AS APPLIED TO STREET RAILWAYS.

There would never have been any occasion for employer's liability acts if it were not for the accepted doctrine that one who is injured through or by the negligent act of a fellow servant cannot recover from the common employer for the injury. This is known as the co-servant rule. It was said by Chief Justice Shaw, in Farwell v. Boston, etc., Co.,[1] which is said to be the fountain head of all the later decisions on the fellow servant doctine, "When several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, and is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectively secured than could be done by a resort

[1] 45 Mass. 49, 58, 59, 38 Am. Dec. 339, 342, 343.

to the common employer for indemnity in case of loss by the negligence of each other." While this is the accepted doctrine it cannot be denied that in the present industrial conditions the co-servant doctrine, which had for its basis, to some extent at least, the idea that the servant could know and estimate the character of his associates, and that the safety of the common service was promoted by placing that burden on him, has, when applied to the facts in many cases, become an arbitrary rather than a reasonable rule of law. From old conditions, in which an industry was carried on with a few comparatively simple tools and by a limited number of men, all well known to one another, there has been evolved, through machinery, the aggregation of capital and the development of the directing mind, a condition in which, amid the power of machinery, the servant works in industrial plants so great in many instances that the united energies of hundreds or even thousands of men are required for its operation. In such a case the number of employes may be so numerous that no one of them can be reasonably expected to know all the others, their competency, skill and care, so that he can justly be said to voluntarily assume the risk arising from their want of skill or care. In view of this every one must realize that there is a reasonable ground for the essential idea of employer's liability legislation; but we must not overlook the fact that the small business still exists and that under the convenient form of corporate capacity men still carry on industrial undertakings in no essential particular different from those which are carried on by individuals and copartnerships. It is this fact that makes a classification on the basis of the employer inherently bad. It is true that the corporation has within it the porer of great development, possibly of greater development than is possible in the individual concern or copartnership; but, as was said in Bedford Quarries Co. v. Bough,[2] "as the real evil can be reached by a classification which goes to those elements which, to some extent, have removed the reason for the co-servant rule, there is not even a color of an excuse for imposing burdens on a corporate employer, while its competitor, a natural person, who is carrying on under the same conditions like business, is left without any such burden." I may say that the legislatures of most of the states that have legislated upon the subject, seem to have aimed at private corporations, but that the courts have universally held that classification of employers was contrary to the provisions o the fourteenth amendment of the federal constitution which guarantees to every one the equal protection of the laws. They hold thi to be an unfair classification. The courts do hold, however, that legislatures may make a classification for legislative purposes, that they may differentiate as to businesses and classify certain businesses as hazardous and so place certain restrictious on them or add certain burdens. The classification must have some reasonable basis on which to stand. Such legislation must operate equally upon all within the class, but the classification must furnish a reason for and justify the making of the class; that is, the reason for the classification must inhere in the subject matter, and rest upon some reason which is natural and substantial. Not only must the classification treat all brought under its influence alike, under the same conditions, but it must embrace all of the class to which it is naturally related. Neither mere isolation nor arbitrary selection is proper classification.[3] So although courts hold that a classification that selects the employer and puts him off into a class by himself and attempts to prescribe a peculiar rule of law for him is bad, they have very generally held employer's liability acts valid as to those engaged in operating railroads no matter how they were worded, saying that, the frequency and magnitude of the dangers to which those employed in operating railroads are exposed; the difficulty, sometimes impossiblity, of escaping from them with any amount of care; the fact that a great number of men are employed, co-operating in the same work, so that no one of them can know all the others, their competency,

[2] (Ind.), 80 N. E. Rep. 529.

[3] Dixon v. Poe, 159 Ind. 492; Street v. Varney Electrical Supply Co., 160 Ind. 338; Town of Longview v. City of Crawfordsville, 164 Ind. 117, 121-124, 73 N. E. Rep. 78; School City of Rushville v. Hays, 162 Ind. 200-204, 70 N. E. R ep. 134; Ballard v. Miss. Cotton Oil Co., 81 Miss. 507, 62 L. R. A. 407; Slocum v. Bear Valley Irr. Co. (Cal.), 55 Pac. Rep. 403; Johnson v. Goodyear Mining Co. (Cal.), 59 Pac. Rep. 304; Lavallee v. St. Paul R. Co. (Minn.), 41 N. W. Rep. 974; Johnson v. St. Paul R. Co. (Minn.), 45 N. W. Rep. 156; Cotting v. Kansas City Stockyards Co., 183 U. S. 79, 107-112, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 560-564, 22 Sup. Ct. Rep. 481.

skill and care, so that he may be said to voluntarily assume the risk arising from the want of skill or care by any one of the number—are a sufficient reason for applying a rule of liability on the part of the employee so employed different from that ordinarily applied between master and servant; that the employer's liability should be greater when the business is that of operating a railroad, but that one individual or corporation should not be held to a rule of liability different from that applied to another, when the employment and its hazards are precisely the same.[4] The Minnesota act applies in terms to railroad corporations, but was construed to apply only to those engaged in the business of operating the road.[5] The Iowa statute was construed the same way in Deppe v. Chicago, etc., R. Co.[6] The Kansas statute was given the same construction in Mo. Pac. R. Co. v. Haley, Admr.,[7] where it was held that it "embraced only the persons exposed to the hazards of the business of railroading." The Indiana statute was held in Pittsburg, etc., R. Co. v. Montgomery[8] to be capable of severence and was held constitutional as to railroads because of the peculiar hazards attending the operation of a railroad even if unconstitutional as to other corporations. The above construction was approved in Pittsburg, etc., R. Co. v. Lightheiser.[9] In both of the above cases it was held that it did not contravene the fourteenth amendment of the federal constitution. The Mississippi statute was held unconstitutional because it applied to corporations and not to individuals engaged in the same business.[10] For the same reasons an Illinois anti-trust act was held unconstitutional as it exempted agriculturists from its provisions.[11] So that it is clear that the undisputed rule is, that a statute is unconstitutional when it exempts from its provisions any one of a class, but is constitutional if it includes within its provisions all that belong to the class, and courts will sometimes go out of their way in upholding a statute and include within its provisions companies and concerns not expressly included. The Minnesota employer's liability act only applies in terms to railroad corporations, yet the supreme court of that state in Schus v. Powers-Simpson Co.,[12] in which the defendant was not even a corporation, but was a copartnership engaged in the logging business and which had tracks leading back into the timber and had two or three locomotives which they employed in hauling their logs out of the woods, which locomotives and attached cars were manned by crews, said, "that as the spirit and purpose of the law was the protection of employees engaged in a hazardous and dangerous work, though the literal language thereof limits its operation to railroad corporations, we hold that it applies to any corporation or person engaged in operating a line of railroad, incident to which operation are the dangers and hazards to its employees the legislature intended to guard against." So we may safely say that the courts of the country universally hold employer's liability acts to be constitutional when applied to railroads, because of the peculiar hazards of the business of operation and sometimes as in the Minnesota case above cited, include companies not expressly included, but whose employees are exposed to the same hazards and dangers to which the employees of railroad corporations are exposed. It is the business of railroad operation and not the employer, which is classified.

So much for the first part of this subject. Now as to the question of whether or not a street railroad is included within the provisions of these acts and whether or not they are to be subjected to the same burdens as railroads, as generally understood. Is a street railroad a railroad? The term railroad is a generic term,[13] and thus may or may not include street railroads, according as it was intended by the legislature. For many purposes street

[4] Lavallee v. St. Paul R. Co. (Minn.), 41 N. W. Rep. 974; Johnson v. St. Paul R. Co. (Minn.), 45 N. W. Rep. 156; McAnnich v. Railroad Co., 20 Iowa, 338; Akeson v. Chicago R. Co. (Iowa), 75 N. E. Rep. 676; Deppe v. Chicago R. Co., 36 Iowa, 52; Railroad Co. v. Pontius, 157 U. S. 209, 15 Sup. Ct. Rep. 585; Mo. Pac. R. Co. v. Haley, 25 Kan. 35.

[5] Lavallee v. St. Paul R. Co. (Minn.), 41 N. W. Rep. 974.

[6] 36 Iowa, 52.

[7] 25 Kan. 35, 53.

[8] 152 Ind. 1, 8-14, 49 N. E. Rep. 582.

[9] (Ind.), 78. N. E. Rep. 1041-1043.

[10] Ballard v. Miss. Cotton Oil Co. (Miss.), 95 Am. St. Rep. 476.

[11] Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. Rep. 431; Barbier v. Connelly, 113 U. S. 27, 31, 17 Sup. Ct. Rep. 255.

[12] (Minn.), 89 N. W. Rep. 68, 70, 69 L. R. A. 887.

[13] Savannah, T. & I. of H. Ry. v. Williams (Ga.), 61 L. R. A. 249.

railroads are railroads, while for other purposes it may be that they are not. The courts of some of the states in which the question has arisen, have held that the statutes giving workmen mechanic's liens on the road bed of railroads for their wages, did not apply to street railroads as the fee of the right of way was in the city and not in the company,[14] while the contrary conclusion is reached in St. Louis Bolt & Iron Co. v. Donahue,[15] and also in Koken Iron Works v. Robertson Ave. R. Co.[16] Much depends upon the context of the act in question. Indeed, most of the decisions which hold that acts applying to railroads do not apply to street railroads are put upon the ground that they are not included within the context. In Manhattan Trust Co. v. Sioux City Cable R. Co.,[17] it was held that the Iowa statute making a judgment against any railroad corporation, for injury to person or property, a lien superior to that of mortgages on its property, does not apply to street railway corporations, as the context of the act[18] refers to steam railroads. The same conclusion was reached by the federal district court in construing a Montana statute, similar to the Iowa act above referred to, and the decision was put upon the same grounds.[19] The franchise to use the streets being granted by legislative or municipal authority, and the tracks being laid on established streets, and usually restricted to the bounds of the city statutes providing for the condemnation of rights of way have little or no reference to street railways using electricity or horse power.[20] A horse railway is not a railroad within the meaning of the Tennessee statute which required the stopping of every engine or train before crossing an intersecting railroad.[21] So in Iowa it was held that a street railroad might lay its tracks before ascertaining and paying damages to abutting property owners, whereas the statute required railroad companies to pay damages before laying their tracks.[22] In Funk v. St. Paul City R. Co.,[23] it was held that the Minnesota Employer's Liability Act, which was passed in 1887, did not apply to street railroads, as there were no street railroads of the cable type in operation when the act was passed and further that in all previous legislation in the state, there was no act in which the word "railroad" or "railway," standing alone, was not evidently intended to be applied exclusively to ordinary commercial railways, and that in all acts in which street railroads were included in its provisions the word "street" was prefixed. Judge Mitchell, in a concurring opinion said: "I do not claim that there might not be a law enacted where it would be evident, from its subject matter and object, that the word 'railroads' was intended to include street railroads." So in this case, which is much cited and referred to, the decision is put mainly upon the ground that the context of the act does not refer to street railroads, though incidentally it is said that the employees of streeet railroads are not subjected to the peculiar dangers and hazards to which the employees of steam railroads are exposed. The upper court of Missouri in Sams v. St. Louis & M. R. R. Co.,[24] holds that although the defendant corporation was organized under the general railroad act and had even condemned a right of way at one time between two parts of the city in which it operated, it was nevertheless a street railroad and not liable for the negligence of a fellow servant of the plaintiff. The court says that although we must look to the charter of corporations to determine what they are empowered to do, we must look at what they do to determine what they are. But the principal reason for the decision rests upon the fact that in previous legislation the legislature had merely used the word railroad in referring to steam railroads while in street railroad enactments, it had always prefixed the term "street." In Kentucky a street railroad is said to be, in a technical and popular sense, as different from an ordinary railroad as a road and a street, or as a bridge and a railroad bridge.[25] On the other hand

[14] Front St. Cable R. Co. v. Johnson, 2 Wash. 112, 11 L. R. A. 693.

[15] 3 Mo. App. 559.

[16] 141 Mo. 228, 44 S. W. Rep. 269.

[17] 68 Fed. Rep. 82.

[18] McClain's Code, Iowa, Sec. 2008.

[19] Mass. Loan & Trust Co. v. Hamilton, 88 Fed Rep. 588.

[20] Thompson-Houston Electric Co. v. Simon (Oreg.), 10 L. R. A. 251.

[21] Byrne v. Kansas City, Ft. S. & M. R. Co., 24 L. R. A. 695.

[22] Sears v. Manhattan Street R. Co. (Iowa), 23 N. W. Rep. 150.

[23] 61 Minn. 435, 29 L. R. A. 208.

[24] 61 L. R. A. 475.

[25] Louisville & P. R. Co. v. Louisville City R. Co., 2 Duv. 175.

the New York general railroad law of 1850 was held to include horse railroads, though the act referred to other motive power.[26] A street railroad using ordinary engines is a railroad within the meaning of the Alabama statute requiring trains to stop within 100 feet of a track crossing.[27] A dummy line, whether operated within or without the limits of a municipality, and although exclusively engaged in carrying passengers, is a railroad within the meaning of the statutes prescribing certain precautions for the prevention of accidents on railroads.[28] Street railroads are within the provisions of the Pennsylvania act relating to the merger of different companies.[29] A horse railroad is within the exception of the Massachusetts statute providing that insolvent proceedings may be instituted against any corporation except railroad and banking companies, though at the time of the passage of the statute no company had been established in that state for the purpose of laying rails on public highways and running cars thereon.[30] The Kentucky statute making railroad companies liable for negligence is applicable alike to all railroad companies, whether impelled by horse or steam power.[31] The similarity of urban and interurban railroads to the ordinary steam railroad, the rapidity of their movements, the enlargement of their cars, the marvelous increase in their business, have compelled the courts to recognize, if not the identity, at least the close resemblance, between the two; and, while the reasoning may not in all respects support the contention, it was held in Stillwater & M. Street R. Co. v. Boston & M. R. Co.,[32] that the enactment of 1890, which conferred on a steam railroad company the right to cross or unite its railroad with any other railroad before constructed, and further providing that every railroad company whose road was intersected by any new railroad should unite with such in having the necessary connections with the requisite facilities, applied to the intersection and connection of a street railroad operated by electricity with a railroad operated by steam. Civil Code 1895 of Georgia provides that all railroad companies shall be sued in the county where the cause of action originated, and, while the point does not appear to have been directly made, its provisions were, in Devereux v. Atlanta R. & Power Co.,[33] held to apply to the case of a street railroad. Though no such species of railroad existed when the act was passed, it was held in Price v. State,[34] that an act providing a penalty for obstructing a railroad, applied to a street railroad operated by horse power. In Savannah T. & I. of H. Ry. Co. v. Williams,[35] the court held that the employer's liability act of Georgia, which referred to railroad companies was applicable to street railroad companies and said on page 252: "The contention of the plaintiff in error is that, if 'railroad' can mean 'street railroad,' Sec. 2297 of the Civil Code does not apply to street railroads, because the abrogation of the fellow servant rule is therein shown to have been because railroad companies necessarily have many employees who cannot possibly control those who should exercise care and diligence in the running of trains. It claims that this language shows that the legislature was considering a state of affairs applicable only to steam lines. * * * The maxim, *Cessante ratione, cessat ipsa lex*, is of great assistance in construing doubtful, impossible, and unreasonable provisions. But it should not override the express language of a statute. An act may originate from a desire to remedy a particular evil, and yet the language may be so framed as to extend its provisions into a territory where the special evil does not exist. So, too, the language may be so framed as to prevent its application in a territory where the same evil does exist. This is well illustrated in this very section changing the doctrine of fellow servant, for this court, in holding that a 'receiver' was not a 'railroad company' and therefore not within the language of Sec. 2323, said: 'It may be uncandid to deny that to a certain extent the same reasons of public policy and private justice which call for the protection of the

[26] *In re* Washington Street Asylum & P. R. Co., 115 N. Y. 442, 22 N. E. Rep. 356.
[27] Birmingham Mineral R. Co. v. Jacobs (Ala.), 12 L. R. A. 830.
[28] Katzenberger v. Lawo (Tenn.), 13 L. R. A. 185.
[29] Hestonville, M. & T. Pass. R. Co. v. Philadelphia, 89 Pa. 210.
[30] Central Nat. Bank v. Worcester Horse R. Co., 13 Allen, 105.
[31] Johnson v. Louisville R. Co., 10 Bush. 231.
[32] (N. Y.), 59 L. R. A. 489, 64 N. E. Rep. 511.
[33] (Ga.), 36 S. E. Rep. 939.
[34] 74 Ga. 378.
[35] (Ga.) 61 L. R. A. 249.

operatives of a railroad when owners or lessees are in possession apply when receivers are in possession.' Conversely, the section has been construed to apply to those working on bridges and in railroad machine shops, though these cases were not within the evil sought to be corrected." The court further says in its opinion: "But these plaintiffs were servants of a railroad company, and within the letter of the law, and therefore entitled to its provisions. The same literalism that denied the benefit of the statute to the employees of a receiver when the reason, and not the letter, applied, gives it to bridge and planing machine employees of a railroad when the reason did not apply, but the letter did. These bridge and planing machine cases are within the letter of the statute, though beyond the evil that may have prompted the adoption of the act. So, while street railroads may not then have been so dangerous, they were still railroad companies, and within the purview of the law. They are not outside of the policy underlying the statute. They had tracks, and had, or might have had bridges. The utmost diligence on the part of the driver might not have enabled him to guard against the negligence of other fellow servants who were charged with the duty of keeping the track in repair. While there might not be as many injuries occasioned by the negligenee of a fellow servant in street car service, yet the language of the statute was broad enough to take in these few instances as they arose. If the legislature used language which was broad enough to include street railroads, and if, to some extent, they were within its spirit, even though not as much so as steam railroads, the courts have no right to pare down its meaning, and say that the law does not apply to the employees of a street railroad." This seems to be good reasoning. There would seem to be no reason why an employer's liability act which is broad enough in its provisions to include street railways should not be construed to apply to them. The dangers of operating a street railroad are similar to those of operating a steam railroad. They are of the same nature if not of the same degree. Of course the intent of the legislature must be sought and the context is of great value in determining that.

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## CORPORATIONS — INJURY TO EMPLOYEE— MEDICAL ATTENDANCE.

### SALTER v. NEBRASKA TELEPHONE CO.

*Supreme Court of Nebraska, June 22, 1907.*

**When a serious injury requiring immediate medical or surgical services is incurred by the employee of a company engaged in a business dangerous to its employees, and the injury is received at a place distant from the home of the injured party, any general officer of the company then present may engage such medical or surgical treatment and care as the case requires, and bind the company for the reasonable value thereof, without any proof on the part of the party furnishing such treatment and care that such general officer of the company had special authority to make such contract, or that such action on his part came within the general scope of his power and duties.**

**In case of serious injury to an employee under the circumstances above set out, if no general officer of the company is present, the highest officer or person highest in authority then present may bind the company for such services as the emergency may demand.**

**While not attempting to formulate any general rule to determine what constitutes emergency treatment for which a company will be liable under employment made by an officer or agent of known limited authority, it ought generally to extend for a time sufficient for the party employed to communicate with the company, and, if it decline to be further responsible, for notice to the proper poor authorities, if the injured party is entitled to public care.**

DUFFIE, C.: January 1, 1904, Bert Crumb, an employee of the Nebraska Telephone Company, fell from the top of a telephone pole to the frozen earth, fracturing his arm at the elbow to such an extent that the ends of the broken bones protruded through his coat into the earth. He was taken to Hubbard, some 4 1-2 miles distant, and the next morning put on the train and taken to Norfolk, where he was placed in a hospital operated by the plaintiffs. One O. E. Dugan, the foreman in charge of the working gang of which Crumb was a member, was in Norfolk at the time, and made arrangements with the plaintiffs for the reception and treatment of Crumb. The evidence discloses that Crumb had received a compound fracture of the elbow joint: that in drawing back the protruding bones previous to his reception by the plaintiffs, some 19 hours after the accident, dirt and other foreign matter, which had been taken into the wound caused by the protruding bones, infected the arm, and this infection spread over the entire system, necessitating a number of operations, among others the removal of the elbow joint, which operation was performed by the plaintiffs on January 16th. It further appears that Crumb's condition was such as to require the constant attendance of a nurse and the services of both the plaintiffs to dress his arm, which was necessary from two to three times a day for some time after his reception. There is evidence tending to show that at no time previous to his leaving could Crumb have been moved from the

hospital without great danger to his life. Crumb was received by the plaintiffs on January 2, 1904, and discharged on July 28, 1904. This action was commenced against the defendant and appellant to recover the value of the professional services; rendered and for board and hospital services the amount claimed being $918. The answer admits that Crumb was an employee of defendant corporation and was injured so as to become in need of immediate medical and surgical treatment: avers that Dugan employed the plaintiffs to render such services on January 2, 1904, but that he then informed plaintiffs that defendant would not be responsible or pay plaintiffs for more than the first surgical treatment, and that neither he (Dugan) nor any other employee of defendant had authority to employ plaintiffs and to obligate the defendant for more than the first treatment given Crumb. The answer further offered to let plaintiffs take judgment for the value of the first treatment of said Crumb as specified in the petition, to wit, setting arm $25, with the costs to date of filing the answer. On the trial the defendant interposed numerous objections to evidence offered by the plaintiffs, which objections were overruled and exceptions duly entered. The defendant offered evidence to show that Dugan had no authority to make any contract on behalf of the company for services rendered to an employee of the company, except for the first treatment given such injured employee; also, that Dugan informed one of the plaintiffs on January 3, 1904, that the defendant would not be responsible for any services other than the first treatment of Bert Crumb; that at a later date another employee of the company informed one of the plaintiffs, when interrogated about the payment for services rendered Crumb, that it was a matter to be decided later by the company; and that on another occasion the district manager of the defendant company at Norfolk informed one of the plaintiffs that by the rules of the defendant company it would not hold itself responsible for surgical and medical attendance received by one of its injured employees, except only for the first treatment. An objection to these offers made by the plaintiffs was sustained by the court and defendant's exceptions duly entered. At the conclusion of the testimony, the defendant moved the court to direct a verdict for the defendant as to the entire claim of the plaintiffs, except $25 for the first treatment, interest, and costs, and the plaintiffs moved for a directed verdict for the entire amount of plaintiffs' demand, with interest and costs. The court sustained the plaintiffs' motion, and in accordance therewith directed a verdict for the plaintiff for the sum of $971.70. From a judgment entered upon this verdict, the defendant has appealed to this court.

It will be unnecessary, as we view the case, to pass upon all the errors assigned by the appellant. While the rule is not uniform, there are many cases holding that, where a company is engaged in a business dangerous to its employees in case of an accident of such serious character that the injured employee stands in need of immediate medical or surgical attendance, the conductor of a train, or the highest officer of the company present at the time, has, from the necessities of the case, authority to represent the company and to bind it by the employment of a surgeon for such immediate medical or surgical services and care as are required. In support of this rule the court in Terre Haute & Indianapolis R. R. Co. v. McMurry, 98 Ind. 358, 49 Am. Rep. 752, said: "An employer does not stand to his servants as a stranger. He owes them a duty. The cases all agree that some duty is owing from the master to the servant, but no case that we have been able to find defines the limits of his duty. Granting the existence of this general duty, and no one will deny that such duty does exist, the inquiry is as to its character and extent. Suppose the axle of a car to break because of a defect, and a brakeman's leg to be mangled by the derailment consequent upon the breaking of the axle, and that he is in imminent danger of bleeding to death unless surgical aid is summoned at once, and suppose the accident to occur at a point where there is no station, and where no officer superior to the conductor is present, would not the conductor have authority to call a surgeon? Is there not a duty to the mangled man that some one must discharge? And, if there be such a duty, who owes it—the employer or a stranger? Humanity and justice unite in affirming that some one owes him this duty, since to assert the contrary is to affirm that upon no one rests the duty of calling aid that may save life. If we concede the existence of this general duty, then the further search is for the one who in justice owes the duty, and surely, where the question comes between the employer and a stranger, the just rule must be that it rests upon the former."

In Marquette & Ontonagon R. R. Co. v. Taft, 28 Mich. 289, the yardmaster of the defendant company employed a physician to amputate a leg and bind up the wounds and bruises of an employee injured in the service of the company. The employment by the yardmaster was afterward ratified by the general superintendent. The company defended upon the ground that it was not shown that either the yardmaster or the general superintendent acted within the scope of their authority in employing the surgeon. Judgment went in favor of the plaintiff in the trial court, and this judgment was affirmed by the supreme court; Justices Groves and Campbell voting for a reversal, Cooley and Christiancy voting for an affirmance. Judges Cooley and Christiancy appeared to have based their decision more upon the ground of the ratification of the employment by the general superintendent than upon the authority of the yardmaster to make a contract binding the company in the first instance. In Toledo, St. L. & K. C. R. R. Co. v. Mylott, 33 N.

E. Rep. 135,6 Ind. App. 438, a brakeman on the appellant's road met with an accident by which his skull was crushed. The conductor requested the appellee to board and care for the injured man in every way necessary, stating that the company would pay for the same. The conductor was the highest officer of the company then present. After discussing the right of a general officer to bind the company by such employment, the court proceeded to discuss the right of the conductor to do so. We quote from the opinion: "It being established that the general officers of the company would have the power, under such circumstances, to bind the company for the necessary board, care, and attention furnished an employee injured while in the performance of his duty, it follows, under the authorities, that the conductor also has such authority under certain circumstances. That the conductor has no general authority in ordinary cases is conceded; but it is clear that he has such authority in the case of an emergency, where an accident occurs remote from the general offices, when he is the highest officer of the company present, and when immediate action is required in order to preserve and protect the life of the injured man. In the face of this emergency, requiring immediate action to preserve human life, the duty devolves upon the company to act, and the conductor stands in the place of the company, clothed with such powers as may be necessary to meet the exigencies of the occasion." The SupremeC ourt of Indiana,sofar as our examination of the authorities has extended has gone further than any other in adopting the rule that a subordinate officer has authority to bind the company by the employment of physicians and surgeons in case of an emergency, and where no higher officer of the company is present at the time, and these decisions are all to the effect that such employment binds the company only for the first or emergency service. There are numerous cases from other states holding that where such services are obtained, and where there is a direct or inferential evidence of a ratification by some general officer, then the company is bound for all services so rendered. In T., W. & W. Ry. Co. v. Rodrigues, 47 Ill. 189, 95 Am. Dec. 484, the station agent of the company employed the appellant to nurse and take care of one Johnson, an injured employee of the company. He wrote to the general superintendent, making a full statement of all that had been done. The fourth paragraph of the syllabus is in the following words: "Where an employee of a railroad company has received injury while in the discharge of his duty, and the station agent, in his capacity as such, assumes certain liabilities in his behalf for nurse and medical attendance, and writes a letter to the general superintendent, stating the facts, it is presumed that the general superintendent received such notice, and, in the absence of any instructions to the contrary, consented, on the part of the railroad company, to assume the liabilities of the station agent for all reasonable charges in this behalf." T., W. & W. Ry. Co. v. Prince, 50 Ill. 26; Ind. & St. L. Ry. Co. v. Morris, 67 Ill. 295, and Cairo & St, L. R. R. Co. v. Mahoney, 82 Ill. 73, 25 Am. Rep. 299, are to the same effect, but. as will be seen these are based on the ratification by a general officer of the company of employment made by one without general authority to do so. On the whole, we are inclined to adopt the rule that a general officer of the company has power to make such a contract as is here sued on without showing that he had special authority to do so, and, if an emergency demanding immediate action exists, then the highest officer then present, whether he be conductor of a train, the station agent of the company, or the foreman in charge of a gang of workmen, may bind the company for such medical and surgical attendance as the exigencies of the case may immediately demand. We recognize that this rule is one required by an emergency rather than one based on any general legal principle, and that the authority of the officer with limited powers can extend no further than the emergency demands. As said in Holmes v. McAllister, 123 Mich. 493, 82 N. W. Rep. 220, 48 L. R. A. 396: "Authority to act is implied from the necessity of the case. * * * Neither the authorities nor reason carry the rule beyond the emergency. Such employment does not make the employer liable for services rendered by the physician to the employee after the emergency has passed. If the physician desires to hold the employer responsible for subsequent services, he must make a special contract with him."

It is urged by appellee that the emergency in this case continued during the time that Crumb was in the hospital, and this was probably the theory upon which the district court directed a verdict for the plaintiff for the full amount of the claim. T., St. L. & K. C. R. R. Co. v. Mylott, *supra*, and Williams v. Griffin Wheel Co., 87 N. W. Rep. 773, 84 Minn. 279, are cited in support of this position. A careful reading of the opinion in the Mylott case will disclose that the only question considered by the court was the right of the plaintiff to recover at all, and that the question of the amount of the recovery was not involved. In the concurring opinion of Davis, J., it is said: "No question is raised as to the extent or amount of the recovery. The only question presented for our consideration is whether appellee was entitled to recover anything. The court does not hold that appellee was entitled to recover for board of others or for the continued care and nursing of the brakeman beyond the emergency then existing." We do not attempt to define what are primary or emergency services; and Williams v. Griffin Wheel Co., *supra*, does not assist us in attempting to determine the question, as the facts of that case are dissimilar from this case, so far as disclosed in the opinion, and apparently are not fully stated. We believe, how-

ever, that emergency services, unless expressly limited at the time of procuring them, ought to extend to a sufficient time for the party employed to communicate with the company, and, if it decline to be further responsible, for notice to the proper poor authorities, if the injured party is entitled to public care.

For the reasons that the law will not impose upon the defendant company the duty of caring for one of their injured employees except for emergency treatment, and for the reason that the court refused evidence going to show that the company expressly disclaimed liability for further treatment, we recommend a reversal of the judgment.

Per Curiam. For reasons stated in the foregoing opinion the judgment of the district court is reversed.

NOTE.—*Authority of Agents of a Corporation to Employ Medical Attendance for Injured Employees.*—The question discussed in the principal case has always presented considerable difficulty to the courts having occasion to consider it. The question presents to the student three phases, which in the order of their importance are as follows: First. Has a corporation implied power under its charter to employ medical attendance for its wounded employees? Second. If it had such power, what is the consideration for such services? Third. What agents of the company may be said to have implied authority to bind the company under a promise to pay for such services?

*Power of Corporation to Care for Wounded Employees.*—We do not understand that there is any one who questions the implied power of a corporation properly exercised to employ medical attendance for sick or wounded employees. In the case of Toledo, Wabash & Western R. R. Co. v. Rodrigues, 47 Ill. 188, 95 Am. Dec. 484, the court said: "Although the charter of a company may not, in terms, authorize the body to incur expense on account of injury received by their employees, in the discharge of their hazardous employment, yet it will not be seriously contended but that they may, in exercising their franchise, incur such a liability. If, from the necessary hazards of the employment, a person devoting his energies in promoting the interest of the company, at a moderate compensation without fault on his part, is severely injured, and for a length of time is wholly disabled, humanity, if not strict justice, would say that when the company have employed others to take the care, and incur the expenses of his cure, they should be compelled to observe their contract, and meet the expense." This power is further evidenced by the reasoning of that long line of authorities which permit railroad companies to build hospitals for sick and wounded employees and to levy assessments therefor upon their employees in order to maintain it as well as to contribute thereto out of their own funds. Beck v. Railroad, 63 N. J. Law, 232, 43 Atl. Rep. 908, 76 Am. St. Rep. 211; Eckman v. Railroad Co., 169 Ill. 312, 48 N. E. Rep. 496, 38 L. R. A. 750; Donald v. Railroad Co., 93 Iowa, 284, 61 N. W. Rep. 971, 33 L. R. A. 492; Pittsburg, etc., R. R. Co. v. Moore, 152 Ind. 345, 53 N. E. Rep. 29, 44 L. R. A. 638· Vickers v. Railroad Co., 71 Fed. Rep. 139; Ringle v. Railroad Co., 164 Pa St. 529, 30 Atl. Rep. 492, 44 Am. St. Rep. 628; Fuller v Relief Association, 67 Md. 433 10 Atl Rep 237; Chicago. etc., R. R. Co. v. Bell, 44 Neb. 44, 62 N. W. Rep. 314; Pittsburg, etc., R. R. Co. v. Cox, 55 Ohio St. 497, 45 N. E. Rep. 641, 35 L. R. A. 507. In the case of Marquette, etc., R. R. v. Taft, 28 Mich. 289, Justice Graves speaking of the power of a railroad corporation to employ medical attendance for those injured in the course of their employment, uses this language: "I think it is not too much to add that it was the duty of the company to keep lodged, where it could be reasonably expected, a discretionary power for meeting such emergencies, and that in the interests of humanity it ought to be used cheerfully and liberally."

*What is the Consideration for a Promise to Pay for Such Services.*—Every promise should have a consideration. What consideration is it which would support a promise on the part of a corporation to pay for medical attendance furnished at their request to an employee injured in the course of his employment? We take it for granted that there is no duty resting upon the master, whether corporation or individual, to incur expense for medical attendance for employees and that in the absence of any implied promise they could not be held liable for services rendered to their injured employees. Davis v. Forbes, 171 Mass. 548, 51 N. E. Rep. 20, 47 L. R. A. 170; Jesserich v. Walruf, 51 Mo. App. 274; Sweetwater Mfg. Co. v. Glover, 29 Ga. 399; Denver, etc., R. R. Co. v. Iles, 25 Colo. 19, 53 Pac. Rep. 222; Malone v. Ice Co., 88 Wis. 542, 60 N. W. Rep. 999; Florida Southern R. R. Co. v. Steen, 45 Fla. 313, 34 So. Rep. 571; Vorass v. Rosenberry, 85 Ill. App. 623. We believe the consideration for such a promise, aside from humanitarian considerations, lies in the fact that the injured person is an employee and thus a necessary part in the operation of the business, whose injury necessarily affects the business of the company, and whose complete and rapid recovery is to the advantage of the company. In addition to this, the contingent liability which arises from every injury to an employee, to-wit, that the master will be liable if the injury has been caused by his (the master's) negligence, is an additional consideration to support a promise for instantaneous medical relief in order to avoid as much of the possible damage which might result from the injury. In the case of Toledo, etc., Railway Co. v. Rodrigues, *supra*, the court said: "When an employee has been disabled and rendered helpless, in the employment of the company, we can see no reason why this is not a sufficient consideration to support a promise to pay for the nursing and medical attendance necessary to his cure, when the agreement is express and not by implication. To have such effect, there should at least be a request to perform the service and compel payment. The request should be express and explicit, and from a person who is empowered to act for the company." In Missouri, the consideration is presumed to be totally lacking, at least as attaching to a mere request of the master to a physician, and it is held in that state that where a person requests a physician to perform service for a patient, the law does not raise an implied promise to pay for the reasonable value of the services so rendered, unless the relation of the person making the request to the patient is such as raises a legal obligation on his part to call in a physician and pay for his services, and that there is no such relation existing between employer and employee. Jesserich v. Walruff, 51 Mo. App. 270; Meisenbach v. Southern Cooperage Co., 45 Mo. App. 232.

*What Agents of the Company May be Said to Have Implied Authority to Bind the Corporation Under a Promise to Pay for Such Services.* — We now come to the most important part of this discussion. To quote from the language of the court in the case of Toledo, etc., Ry. Co. v. Rodrigues, *supra*, the promise in such cases should be explicit and proceed "*from a person who is empowered to act for the company.*" Who may act for the corporation in making such promise, the authorities have not answered with unanimity. The difficulty here consists in fastening upon the proper titular dignitary of the corporation who, from the title he bears, and the general scope of the duties which he is supposed to perform, would most likely be the person with whom the corporation has lodged the power to make such a promise. The courts are agreed that the corporation should and must lodge this power somewhere. "We think it their duty" says Judge Cooley in the great case of Marquette, etc., R. R. v. Taft, 28 Mich. 289, 302, "to have some officer or agent, at all times competent to exercise a discretionary authority in such cases, and that on grounds of public policy they should not be suffered to do otherwise."

What officer of a corporation shall the courts presume from the nature of his employment to have implied power to employ the services of a physician to attend upon an employee who is injured in the course of his employment? We have already observed from the case of Toledo, etc., R. R. Co. v. Rodrigues, *supra*, that the superintendent of a railroad is such an officer from whose title it may be presumed the railroad company has lodged in such officer a discretionary power for this purpose. Other authorities which hold to the same rule are as follows: Union Pacific R. R. Co. v. Winterbotham, 52 Kan. 433, 34 Pac. Rep. 1052; Marquette, etc., R. R. Co. v. Taft, 28 Mich. 289 (Cooley, J's. opinion); Walker v. Railroad Co., L. R. 2 Exch. 228, 36 L. J. Exch. 123, 16 L. T. Rep. (N. S.) 327; Pacific R. R. Co. v. Thomas, 19 Kan. 256; Railroad Co. v. Davis, 44 Am. & Eng. R. R. Cases, 459. The case of Pacific Railroad Co. v. Thomas, *supra*, extended this titular presumption of authority to a division superintendent of a railroad, the court saying: "We think that presumptively the general superintendent of a railroad company would have authority to employ a surgeon to attend on an employee of the company who had been injured while in the employ of the company, and presumptively that the division superintendent would have in respect to matters happening within his jurisdiction the same authority as the general superintendent, although in both cases these presumptions might be rebutted by evidence, and it might be shown that neither the general superintendent nor the division superintendent had any such power or authority." In this Thomas case, the action was based not on the direct authorization of the division superintendent, but on the latter's ratification of an unauthorized agreement by a minor official. The court held the ratification binding on the company even where that ratification consisted, as it did in this case, in simply ignoring a letter and bill for services from the physician seeking compensation for services. The court said on this point: "We also think that presumptively, and in the absence of anything to the contrary, where an officer or agent of the company has the power in the first instance to employ a physician and make the company responsible for his services, such officer or agent would also have the power to ratify a previous unauthorized employment of such physician and surgeon, and thereby make the company responsible for his services."

An instruction with regard to an assistant superintendent's authority to employ nurses which was held good in the case of Bigham v. Railway Company, 79 Iowa, 534, 44 N. W. Rep. 805, will be of interest. The court said: "The court below directed the jury that if the assistant superintendent had general supervising authority over the defendant's interest, he possessed authority to employ nurses, and that unless he had such authority, and did employ plaintiff, or authorized his employment, what he said or did should not be considered. We think the instruction is correct." We are inclined to the opinion that this instruction solves the great problem which divided the court in the great case of Marquette, etc., Railroad Co. v. Taft, *supra*. In this case the members were evenly divided on the question of whether a plaintiff in this class of cases is aided by a presumption that the general superintendent, because of the very title that he bears, has general supervision of the affairs of the road and therefore authority to meet emergencies of this character, or whether the plaintiff should be required to prove, not necessarily that the directors had given specific power to the superintendent to employ physicians, but whether such official had, in fact, the general supervision of the road, and not some other officer. Judge Cooley argued that a presumption that general discretionary power is vested in an officer arises from the fact that a particular officer is designated "superintendent." Judge Graves argued on the contrary that such superior authority might be lodged in some other officer designated possibly "general manager" or "president," and that it was necessary for the plaintiff to prove that the officer who employed him was either given express power to employ physicians or had such general discretionary powers as would naturally include the power to make the contract sought to be enforced, and that this evidence must be more than merely proving the title which attaches to him because of his employment. We believe Judge Graves' position to be correct, at least, to the extent that plaintiff should prove more than the title of the officer who employed him. He should show, at least in a general way, that the officer who requested his services was the officer who had the highest discretionary control of the railroad's affairs, at least in that particular division of the road; and it would be an easy matter for employees or persons actively connected with a railroad to soon learn who such personage might be. When it is once shown what officer possesses the highest active discretionary power over the affairs of a railroad or of a particular grand division of a railroad, then it must be presumed, under the weight of authority, that he had the power to employ medical attendance for sick or injured employees; for, as Judge Cooley properly observes, such a power must be lodged somewhere, and in the absence of a showing on the part of the railroad company that such power has been expressly vested in some other official, it should be presumed to be lodged, along with all other implied powers, in that official possessing and exercising the highest discretionary authority.

Of course, under such a rule, it becomes quite evident that minor officials such as road masters or conducters would not be possessed of such implied powers and thus could not bind the company in this class of cases. Peninsular R. R. Co. v. Gary, 22 Fla. 356, 1 Am. St. Rep. 194. But right here comes the peculiar exception sustained by the principal case and the Indiana authorities which it cites, to the effect that even such minor official, if he is the highest officer in attendance at the time of an accident has

authority to bind the company for emergency relief, that is, only for the first necessary ministrations or until that officer of the company, having authority in the premises, can be consulted. Terre Haute & Ind. R. R. Co. McMurry, 98 Ind. 358; Toledo, etc., R. R. v. Mylott, 6 Ind. App. 438, 33 N. E. Rep. 135.

Missouri seems to stand out strongly against the adoption of the rule of law on the question upheld by the great weight of authority and holds not only that neither a superintendent nor a division superintendent has authority to employ a physician for a sick or wounded employee but that no one has such right, and that a corporation cannot be bound at all under such a contract unless it agrees expressly to pay the bill. Meisenbach v. Southern Cooperage Co., 45 Mo. App. 385; Brown v. Missouri, etc., Railroad Co., 67 Mo. 122. The earlier case of McCarthy v. Railroad Co., 15 Mo. App. 385, seemed to point toward the adoption of the prevailing rule. But in that case it was proven that the general superintendent of a railroad company had special authority to employ physicians for wounded employees and had done so on many occasions, which employments the company invariably recognized and rewarded. In this case the superintendent instructed the doctor, on the latter's inquiry, to "go on and treat the case." The court in that case held the company liable to pay for plaintiff's services.

Judge Seymour D. Thompson who rendered this opinion, spoke also for the court in the later and apparently conflicting opinion in the case of Meisenbach v. Southern Cooperage Co., *supra*, but Judge Thompson in this later opinion distinguishes the two cases as follows: "But that case [McCarthy case] differs from this in two essential points. There was evidence in that case tending to show that the defendant's superintendent told the plaintiff to go on and treat the patient. The superintendent himself also admitted that he had authority from the company to call in a physician in case of an emergency. Here, there is no evidence tending to show that Mr. Fredericks [the superintendent] had such authority, and none tending to show that he told the plaintiff to go on and treat the patient." We believe this distinction, however, to be more fanciful than substantial. In the Meisenbach case the superintendent requested the plaintiff to come to his place of business and attend upon an employee who had been suddenly and frightfully injured. The doctor came and in the presence of the superintendent and the president of the company ministered unto the unfortunate employee. Later the president of the company offered to pay for the plaintiff's services for the first day. The court considered all of this evidence insufficient to render the defendant corporation liable and grounded its decision on the very broad principle that no liability whatever arises where "one calls upon a physician to attend upon a stranger."

The case of Chase v. Swift, 60 Neb. 696, 84 N. W. Rep. 86, 83 Am. St. Rep. 552, which is often cited as opposing the general rule is clearly not an authority for that purpose. There, Swift & Co., packers in Omaha, were held not liable for the attendance of a physician upon employees, hurt during a strike, even at the request of the superintendent, where it was not proven that the injuries occurred in the course of their employment. The court said: "It is certain they were not hurt while in the actual service of the defendant, and, there being no proof that they were assaulted by the strikers, or that there was any causal relation between their injuries and the service in which they were engaged, it seems quite clear that it was not within the apparent range of Foster's agency to employ a physician to attend them."

From this discussion we might state the position of the courts upon the question of the liability of a corporation for medical attendance furnished its employees at its request, to be the same as that which obtains as to the liability of a master generally under such circumstances, to-wit, that he has such a peculiar and special interest in the recovery of a servant, sick or injured in his employment, as will be deemed sufficient to support a promise to pay for such attendance or even to raise an implication of such a promise from a request from the proper authorities that the physician call and minister to the injured employee, thus taking the case out of the general rule that a person cannot be held responsible for medical attendance furnished a stranger, at his request, and classifying the relation, of course in a much lower degree, along with those of husband and wife, and parent and child, which are deemed by the courts to be sufficient to impose a liability upon one member of any of these different relations who may request medical assistance for the other. It is to be observed that all the courts are agreed that if the corporation through an officer properly authorized specifically directs a physician to minister to an employee injured in its employment, or expressly agrees to pay for such services, the corporation will be liable for the reasonable value of such attendance. The authorities are also agreed that it would be clearly beyond the power of any officer of a corporation to employ at the company's expense, medical aid for persons who are not employees, or, if employees, were not taken sick or injured in the course of their employment or by reason of their employment. The authorities are divided, however, on the necessity of an express employment or direct agreement to pay for the services rendered, the weight of opinion, and to our mind the better opinion, holding the corporation liable on its simple but clear request that such services be rendered to its injured employee, and the cases are also in conflict in determining the proper officer to make such request, the prevailing rule, however, being to require that the plaintiff prove that his employment was at the instance of that particular officer, having the largest discretionary power over the business.

A. H. ROBBINS.

## BOOK REVIEWS.

### BIGELOW ON TORTS—EIGHTH EDITION.

There is hardly a doubt in the mind of any thoughtful student of the law that the most accurate statement of the principles underlying and controlling the great questions of law which are classified under the general appellation, Torts, is that contained in the splendid work on that subject, now so well-known to the profession, by Hon. Melville M. Bigelow, dean of the Boston University Law School. The very fact that it has already run through seven editions and that the eighth edition is being received with equal approbation would in itself commend the work to the attention of those interested in the study of the law. Bigelow on Torts is essentially and in a peculiar sense a text-book, a book for students, and for such purpose it has no superior. As a work for the practitioner it is also to be highly commended, although here it may be said to have formidable competition in the great

work of Judge Cooley. It might be reasonably questioned why there should be need of such frequent revision of a work on a subject long considered "set in its rules," quite thoroughly defined, and most of the questions arising where under the consensus of leg l scholarship was supposed to bave satisfactorily and finally determ'ned. But Judge Bigelow shows in his preface that there has been some serious questioning of recent years along many lines, most important of which are the questions which look to the determination of the liability of persons who induce or procure other persons to refuse to make or break their contracts. The entire chapter, which involves the discussion of this question, has been entirely rewritten in this eighth edition and the treatment of these questions, it is needless to say, gives evidence of a thorough knowledge of the law and of ripe scholarship.

Printed in one volume of 502 pages and published by Little, Brown & Co., Boston, Mass.

## HUMOR OF THE LAW.

A lawyer who had some business to attend to in a a small Virginia town, not long ago, tells of an amusing case which he witnessed tried. A negro was charged with stealing a hog. The actual merit of the evidence of the dozen or so witnesses amounted to half of them rather thinking that he had stolen the shoat, and the other half sort of having an idea that he hadn't. The old judge waved them aside impatiently, lighted his corn-cob pipe, and addressed the prisoner.

"Look hyah, Mose," he demanded. "Did yo' steal that hog, or didn't yo'?"

The negro fumbled his wool hat and rolled his eyes.

"'Fo' Gord, Mars Henry," he said, earnestly, "ah nebber stole dat horg, but"—as a disbelieving frown gathered on the Judge's brow—"ef yo' kinder thinks ah done stole him, Mars Henry, an' gwine to gib me six months for lyin', lack yo' done befo', ah radder lie 'bout hit an' 'fess ah did steal hit, 'an get two months for stealin' de horg ah didn't stole—so ah pleads guilty, sah!"

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**



1. ADMIRALTY—Jurisdiction of Court.—An objection to the jurisdiction of a court of admiralty over a cause should be made by plea, or, where the want of jurisdiction is palpable, by demurrer.—The August Belmont, U. S. D. C., E. D. Pa., 153 Fed. Rep. 689.

2. ADVERSE POSSESSION—Redemption.—The possession by virtue of a tax sale certificate held not adverse during the period of right of redemption.—Salt Lake Investment Co. v. Fox, Utah, 90 Pac. Rep. 564.

3. ANNUITIES — Annuity Contract.—The fact that a decedent made a will which made a just disposal of his property and was probated does not establish the validity of an annuity contract made by him.—Barnes v. Waterman, 104 N. Y. Supp. 685.

4. ADVERSE POSSESSION—Statute of Limitations.—If one claims land against the world, the statute of limitations is set in motion, but if he merely claims it tentatively, subject to the result of inquiry as to whether it is within his boundaries, the claim is not adverse.—Wiess v. Goodhue, Tex., 102 S. W. Rep. 793.

5. ANIMALS—Damages Recovered for Permitting Animals to Run at Large.—In an action under Acts 1900 01, p. 170, to recover damages for permitting stock to run at large in a prohibited district, the proceedings for the establishment of the prohibited district held not subject to collateral attack.—Dismukes v. Jones, Ala., 44 So. Rep. 182.

6. ANIMALS—Injury Due to Starting of Horse.—In an action for injuries to a lamplighter in consequence of the sudden starting of his horse, evidence that prior to the accident the horse had formed a habit of starting of his own accord held competent.—Johnstone v. Tuttle, Mass., 81 N. E. Rep. 886.

7. APPEAL AND ERROR—Allegations in Complaint.—Where parties treat allegations in their complaint as though they were controverted, by introducing evidence to prove them, they cannot on appeal raise the point for the first time that there was no issue to try.—Venner v. Denver Union Water Co., Colo., 90 Pac. Rep. 623.

8. APPEAL AND ERROR—Bill of Exceptions.—Where the bill of exceptions does not contain all the evidence, the court will presume in favor of the correctness of the trial court's rulings on requests for affirmative charges and as to charges relating to the weight of the whole evidence.—Sherrell v. Louisville & N. R. Co., Ala., 44 So. Rep. 153.

9. APPEAL AND ERROR—Conflict of Testimony.—Where there is a conflict in the testimony in a case which presents simply a question of fact, and there is no inherent improbability in the contention of the prevailing party, the findings of the trial judge will not be disturbed on appeal.—Miller v. Margulies, 104 N. Y. Supp. 673.

10. APPEAL AND ERROR—Dismissal of Appeal.—Where appellants after a hearing were granted leave to appeal by the appellate court, on a motion to dismiss the appeal, the court will not consider any question presented or which might have been presented on the hearing of the petition for leave to appeal.—Atkinson v. Maris, Ind., 8 N. E. Rep. 745.

11. APPEAL AND ERROR—Notation in Transcript.—A notation in the transcript on an appeal to the supreme court in drainage proceedings. "See certified copy of appeal bonds attached," held insufficient to show that an appeal bond was filed on the appeal to the circuit court.—Smith v. Gustin, Ind., 81 N. E. Rep. 722.

12. APPEAL AND ERROR—Recital.—A mere recital in a motion of a fact as a ground for the motion is not evi dence on appeal of the truth of such fact, but must ap-

pear affirmatively in the record.—Hayman v. Weil, Fla., 44 So. Rep. 176.

18. APPEAL AND ERROR—Supersedeas Bond.—The giving of a *supersedeas* bond held not to estop a defendant appealing from correcting the recod and showing that he was the only defendant appealing.—Pickren v. Northcutt, Ark., 103 S. W. Rep. 208.

14. APPEAL AND ERROR—Writ of Error.—Writ of error will be dismissed, for delay in preparing bill of exceptions, where the certificate of the judge is silent as to the cause of the delay, as the supreme court will not consider evidence to show the reason.—Dykes v. Brock, Ga., 57 S. E. Rep. 700.

15. APPEARANCE — Continuance.—An appearance to apply for a continuance of a matter is just as general as though for the purpose of invoking the action of the court on any other matter.—Zobel v. Zobel, Cal., 90 Pac. Rep. 191.

16. APPEARANCE—Legal Notice.—Defendant, in a proceeding for the establishment of a private road, held to have waived legal notice by general appearance giving the court jurisdiction over him.—Allen v. Welch, Mo., 102 S. W. Rep. 665.

17. ARMY AND NAVY—Sale of Clothing by Soldier.—Sale of a soldier's clothing issued to him during the term of his enlistment constitutes a military offense punishable under the seventeenth article of war, as amended by Act July 27, 1892, ch. 272, 27 Stat. 277 [U. S. Comp. St. 1901, p. 947].—United States v. Michael, U. S. D. C., W. D. Tex., 153 Fed. Rep. 609.

18. ARREST—Validity of Claim.—Jurisdiction to make an arrest in a civil action depends, not on the validity of plaintiff's claim, but on the power of the court to summon defendant to answer and give security for the payment of plaintiff's claim.—*Ex parte* Morton, Mass., 81 N. E. Rep. 869.

19. ASSAULT AND BATTERY—Justifiable Damages.—Where plaintiff and defendant engaged in a fight, during which defendant seized a portion of plaintiff's hand in his mouth, biting off a knuckle and breaking the bones of one finger, held, that plaintiff was entitled to damages.—Milam v. Milam, Wash., 90 Pac. Rep. 595.

20. ASSIGNMENT FOR BENEFIT OF CREDITORS—Dividend From Corporate Funds.—Creditors holding notes of a corporation indorsed by persons who assigned the proceeds of a contract for their payment held not compelled to proceed against the proceeds of the contract before taking a dividend from the corporate funds.—Carter v. Tanners' Leather Co., Mass., 81 N. E. Rep 902.

21. ATTACHMENT—Recovery of Damages.—Fall in price held not recoverable as damages for an attachment; notice permitting sale by defendant in attachment having been given, and he having failed to avail himself thereof.—Bell v. Thompson, Ky., 102 S. W. Rep. 830.

22. ATTORNEY AND CLIENT—Objection to Vacation of Judgment.—The objection to the vacation of a judgment that it could only be set aside by consent of the parties, whereas it was vacated on consent of their attorneys, cannot be raised by others than the parties themselves.—Hookey v. Greenstein, 103 N. Y. Supp. 621.

23. BANKRUPTCY — Bankrupt's Schedules.—Where a bankrupt's schedules showed a debt owing to P, and that the bankrupt claimed it was barred by limitations, P was entitled to examine the bankrupt as to his property without filing a formal claim with the referee, regardless of the rule requiring formal filing of claims before examination.—*In re* Kuffler, U. S. D. C., E. D. N. Y., 153 Fed. Rep. 667.

24. BANKRUPTCY — Bankruptcy Schedules.—Where plaintiff's office address was given in defendant's bankruptcy schedules, instead of his residence, which was in a different county in the state, the debt was not duly scheduled, under Bankr. Act July 1, 1898, ch. 541, § 7, subd. 8, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425].—Weidenfield v. Tillinghast, 104 N. Y. Supp. 712.

25. BANKRUPTCY—Creditors.—Creditors of a bankrupt contractor held either entitled to share generally in the assets, on surrendering liens, or on crediting their claims with the value of the security to prove the balance against the bankrupt's estate under Bankr. Act July 1, 1898, ch. 541 § 57, subd. "h" 30 Stat. 560 [U. S. Comp. St. 1901, p. 3444].—*In re* Grive, U. S. D. C., D. Conn., 153 Fed. Rep. 597.

26. BANKRUPTCY—Insolvency.—It is only where new sales succeed payments, and the net result is to increase the value of the estate, that payments made by an insolvent debtor on a running account are not to be considered as preferential transfers which must be surrendered under section 57g before the creditor can prove the remainder of his claim.—Joseph Wild & Co. v. Provident Life & Trust Co., U. S. C. C. of App., Third Circuit, 153 Fed. Rep. 562.

27. BANKRUPTCY—Parties to Partnership.—An order adjudicating a partnership bankrupt which necessarily determined the existence of the partnership, and its ownership of certain property is conclusive as to such facts as between the parties, but not upon the trustees in bankruptcy of one of the alleged partners who had taken possession of such property as assets of his individual estate, and who were not parties to the partnership proceeding.—Manson v. Williams, U. S. C. C. of App., First Circuit, 153 Fed. Rep. 525.

28. BANKRUPTCY—Receivers.—Where the receiver of a bankrupt acquired possession of a leasehold as a part of the bankrupt's estate, the receiver should not have attempted to make a sale of the lease prior to the trustee obtaining possession.—*In re* Fulton, U. S. C. C., E. D. N. Y., 103 Fed. Rep. 664.

29. BANKRUPTCY — Trustees. — Where a trustee in bankruptcy elects to assume a contract made by the bankrupt, he takes it *cum onere*, and is bound by all of its provisions and conditions, and any valid modification of a written contract made by the bankrupt before adjudication, whether oral or written, or whether known or unknown to the trustee, will be binding upon him.—Atchison, T. & S. F. Ry. Co. v. Hurley, U. S. C. C. of App., Eighth Circuit, 153 Fed. Rep. 503.

30. BANKS AND BANKING—Forwarding Check for Collection.—A bank forwarding a check for collection held not in default because it accepted the collecting bank's draft for the proceeds of the collection, instead of insisting on payment in money.—San Francisco Nat. Bank v. American Nat. Bank of Los Angeles, Cal., 90 Pac. Rep. 558.

31. BANKS AND BANKING—Insolvent Banking Corporation.—A part of the depositors of an insolvent banking corporation in the hands of a receiver may sue the directors for deceit in inducing them to make deposits when they knew the bank was insolvent.—Blumer v. Ulmer, Miss., 44 So. Rep. 161.

32. BENEFIT SOCIETIES—Parol Contract.—A parol contract of insurance by a mutual benefit society is valid, where the agreement has been completed, except as to the issuance of a certificate or policy.—Knights of Maccabees of the World v. Gordon, Ark., 102 S. W. Rep. 711.

33. BILLS AND NOTES—Collection of Notes.—Where it is provided that, if any one of a series of notes is in default, the entire series shall become due, and the notes provide for 10 per cent. attorney's fees, the same may be collected as provided by law.—Stocking v. Moury, Ga., 57 S. E. Rep. 704.

34. BILLS AND NOTES—Persons Sui Juris.—A person *sui juris* may give his note for a debt that he does not personally owe, and in the hands of an innocent purchaser the consideration cannot be questioned.—Adams v. Bartell, Tex., 102 S. W. Rep. 779

35. BOUNDARIES—Adjacent Landowners.—A boundary between adjacent landowners held established by lapse of time and limitations in consequence of continued possession of the premises to the boundary.—Goodwin v. Garibaldi, Ark., 102 S. W. Rep. 706.

36. BROKER—Contract Between Agent and Principal.—An agent, who procured a purchaser who purchased, but not upon the terms stipulated in the contract between the agent and principal, held entitled to recove

for his services upon a *quantum meruit*.—McDonald v. Cabiness, Tex., 102 S. W. Rep. 721.

37. CARRIERS — Action of Railroad. — In an action against a railroad for failure to discharge plaintiff, a passenger, at her destination, her recovery should have been limited to such loss of time, illness and inconvenience suffered as was the natural and reasonable result of being carried by her station.—Louisville & N. R. Co. v. Gaddie, Ky., 102 S. W. Rep. 817.

38. CARRIERS—Assault of Conductor.—Offensive language by a passenger will not justify a conductor in assaulting him —Mitchell v. United Railways Co., Mo., 102 S. W. Rep. 661.

39. CARRIERS—Indictment for Discrimination.—An indictment for discrimination by transportation over different route at a less rate than that filed under a joint traffic arrangement held not defective for failure to allege that the lower rate was not scheduled and filed as provided by Interstate Commerce Act, Feb. 4, 1887, ch. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3158].—United States v. Pennsylvania R. Co., U. S. D. C., W. D. N. Y., 153 Fed. Rep. 625.

40. CARRIERS—Injury of Passenger.—Where a street car passenger was injured as she was making her exit from the car by stumbling over another passenger's bag, placed in the passageway, the conductor held not negligent as a matter of law in permitting the bag to be placed and remain on the floor.—Pitcher v. Old Colony St. Ry. Co., Mass., 81 N. E. Rep. 876.

41. CARRIERS—Street Railroads.—To maintain an action against a street railway company for injuries to a passenger thrown from a car while running over a curve in the track, it must appear that the jolt of the car was more than is ordinarily to be expected, and that it was due to negligence.—Partelow v. Newton & B. St. Ry. Co., Mass., 81 N. E. Rep. 894.

42. CARRIERS—Street Railways.—A $1,000 verdict against a street railway company for an assault upon a passenger by its conductor, provoked by the passenger's offensive language, held excessive.—Mitchell v. United Railways Co., Mo., 102 S. W. Rep. 661.

43. CHARITIES — Residuary Clause. — The residuary clause of a will held to create an educational trust which is a public charity —Trustees of Washburn College v. O'Hara, Kan., 90 Pac. Rep. 234.

44. CHATTEL MORTGAGES—Preservation of Liens.—A court of equity has nothing to do with the questions of diligence or negligence and the balancing of equities, where one party has, and the other has not, complied with the requirement of the registry laws for the preservation of liens.—First Nat. Bank v. Bedford, Ark., 102 S. W. Rep. 683.

45. COMPROMISE AND SETTLEMENT—Recovery of Amount Fraudulently Received.—Where one deceives another into belief they owe him a fixed sum, but states he will take a lesser sum, and they pay it to him, the law of settlements concluding parties to its terms cannot be applied to defeat a right to recover the amount fraudulently received.—Shearer v. Hill, Mo., 102 S. W. Rep. 673.

46. CONSTITUTIONAL LAW—Authenticated Testimony. —Pen. Code, § 686, subd. 3, permitting testimony taken before a committing magistrate, when authenticated and filed under section 869, to be read in evidence on the trial, where the witness is dead, held not to violate Const. art. 1, § 13.—People v. Clark, Cal., 90 Pac. Rep. 549.

47. CONTRACTS—Ambiguous Contract.—In construing ambiguous contracts, the circumstances surrounding and known to both the parties at the time of the execution thereof may be taken into consideration.—Stein v. Archibald, Cal., 90 Pac. Rep. 536.

48. CONTRACTS—Enforcement of Contract.—The owner of property may make a valid enforceable contract binding himself not to dispose of his property by will, and to permit his possessions to descend according to the laws of intestacy.—Jones v. Abbott, Ill., 81 N. E. Rep. 791.

49. CONTRACTS - Misrepresentations of Plaintiff.—A defendant induced to sign a contract by misrepresentations of plaintiff is not barred from relief by the fact that he failed to read the contract or have it read to him.—St. Louis Jewelry Co. v. Bennett, Kan., 90 Pac. Rep. 246.

50. CORPORATIONS — Foreign Corporation. — Where service in an action against a foreign corporation was had on the president or vice president, the return so stating held sufficient, though the return did not state that service was upon him in the capacity of agent.—Venner v. Denver Union Water Co., Colo., 90 Pac. Rep. 623.

51. CORPORATIONS—Relief Against Corporations.—A stockholder seeking relief against the act of a corporation, at most only voidable, must sue promptly upon obtaining knowledge of the conditions or forfeit his right to challenge them.—Boldenweck v. Bullis, Colo., 90 Pac. Rep. 634.

52. COURTS—Decision.—A decision in a case orally argued before supreme court while a special judge was sitting in place of chief justice, but read by the chief justice after resuming his seat, held to be the decision of the court.—Bowles v. Wood, Miss., 44 So. Rep. 169.

53. CRIMINAL EVIDENCE—Parol Evidence.—In order to justify a making of a *nunc pro tunc* entry correcting or amending a bill of exceptions, the record must in some way show facts authorizing such entries, and they cannot be made from the memory of the judge, nor on parol evidence from other sources —State v. Libby, Mo., 102 S. W. Rep. 641.

54. CRIMINAL TRIAL—Affidavit.—A complaint, sworn to by three persons, is the affidavit of each of the three persons who subscribed to it.—State v. Piomondon, Kan., 90 Pac. Rep. 254.

55. CRIMINAL TRIAL—Conviction on Several Counts.—Where defendants were convicted on several counts and sentenced to the same term on each, the sentences to be concurrent, the insufficiency of one or more of the counts was immaterial, if one of them was good.—Imboden v. People, Colo., 90 Pac. Rep. 608.

56. CRIMINAL TRIAL—Former Convictions.—Where accused charged with robbery and former convictions was found guilty of robbery, he was not prejudiced by the court's failure to positively charge the jury not to consider prior convictions in case they found defendant not guilty of the robbery.—State v. Gordon, Mont., 90 Pac. Rep. 173.

57. DAMAGES—Liability. — In an action for injuries, plaintiff held not precluded from recovering for expenditures for nursing and physicians' services because he had included claims for such services in his bankruptcy schedules and had been discharged from legal liability therefor.—Sibley v. Nason, Mass., 81 N. E. Rep. 887.

58. DAMAGES—Personal Injuries.—In a personal injury action, an instruction on the measure of plaintiff's damages held proper, and not objectionable as authorizing double damages.—Beaumont Traction Co. v. Edge, Tex., 102 S. W. Rep. 746.

59. DAMAGES—Personal Injuries.—In an action for a personal injury, the plaintiff is entitled to recover damages for future consequences of the injury only with respect to such consequences as the evidence shows are reasonably certain to ensue.—Daigneau v. Grand Trunk Ry. Co., U. S. C. C., D. Mass., 158 Fed. Rep. 598.

60. DAMAGES—Recovery for Injuries.—In an action for injuries, an instruction with reference to plaintiff's right to recover for lost time between the date of the accident and the date of his adjudication as a bankrupt held properly refused.—Sibley v. Nason, Mass., 81 N. E. Rep. 887.

61. DEEDS—Execution by Grantee.—The execution by a grantee of a mortgage on the property conveyed to her and its delivery to the grantor constituted a sufficient acceptance of the deed of conveyence.—Blackwell v. Blackwell, Mass., 81 N. E. Rep. 910.

62. DESCENT AND DISTRIBUTION—Privilege of Inheritance.—The privilege of inheritance being a creature of law, the legislature may impose such burdens upon it as it sees fit, except so far as it is clearly restricted by the

constitution.—*In re* Tuohy's Estate, Mont., 90 Pac. Rep. 170.

63 DIVORCE—Adjudication.—Where a divorce is obtained without bringing the property rights of the parties before the court for adjudication, any right to the property of the other is waived, and one submitting to a divorce under like circumstances also waives any right to the property of the other.—Ambrose v. Moore, Wash., 90 Pac. Rep. 588.

64 DIVORCE—Condemnation. — While condemnation to an infamous punishment may continue to be a cause for divorce even after a plenary pardon has been granted, continuing adultery of the wife having the custody of the children is more urgent.—Abshire v. Hanks, La., 44 So. Rep. 186

65. ELECTIONS—Rejection of Ballots.—Where a ballot required to be marked with crosses opposite the names of the candidates contained only rectangular marks or blo ches, it was properly rejected as containing distinguishing marks.—Strosnider v. Turner, Nev., 90 Pac. Rep. 581.

66. EMINENT DOMAIN — Additional Servitude. — The lines and poles of a telephone system upon a street of a city constitute an additional servitude where the fee is in the owner of abutting property, though the city uses the poles for its signal service.—De Kalb County Telephone Co. v. Dutton, Ill., 81 N. E. Rep. 838.

67. EQUITY—Demurrer to Bill.—Where a demurrer to a bill offered by two defendants is joint and several, it may be good as to one and bad as to the other; but where the demurrer is joint, it must be good as to each, or it will be bad as to each.—Taylor v. Mathews, Fla., 44 So. Rep. 146.

68. ESTOPPEL—Delivery of Deed.—In an action to compel the production of a deed delivered to the county clerk, but not recorded, or the making of a new one by a commissioner, defendant held estopped by his conduct from denying the delivery of the deed.—Akers v. Shoemaker, Ky., 102 S. W. Rep. 842.

69. EVIDENCE—Incompetency.—The declaration of the deceased husband of a legitimate daughter that the mother of the daughter had an illegitimate child, born before her marriage, are competent to prove the relation of parent and child.—Champion v. McCarthy, Ill., 81 N. E. Rep. 808.

70. EXCEPTIONS, BILL OF—Amendment of Bill.—A bill of exceptions, after proper authentication and filing, can be changed or amended only by being authorized by proper *nunc pro tunc* entries in the trial court based on sufficient memoranda to authorize the making of such entries.—Althoff v. St. Louis Transit Co., Mo., 102 S. W. Rep. 642

71. EXECUTION—Deed Executed by Sheriff.—A deed executed by a sheriff, pursuant to a sale under an execution is not void because of its failure to state that the land sold was located in the county.—Reeder v. Eidson, Tex., 102 S. W. Rep. 750.

72 EXECUTION—Levy.—Where, on trial of a claim case, claimant admits that defendant in execution was in possession at the time of the levy, it is unnecessary to introduce in evidence the execution and levy.—Manley v. McKenzie, Ga., 57 S. E. Rep. 705.

73. EXECUTION—Levy.—Where property worth $2,000 was sold at execution sale for $26 50, and the debtor's ignorance of the levy and sale was excusable, held he could have the sale vacated, though statutory notice of the sale was given.—Odell v. Cox, Cal., 90 Pac. Rep. 194.

74. EXECUTION—Purchaser at Sale.—A purchaser at sale in a suit to foreclose liens held to take no title against one holding an unrecorded deed, whose claim was known. Civ. Code, § 1217.—Robinson v. Muir, Cal., 90 Pac. Rep. 521.

75. EXECUTORS AND ADMINISTRATORS—Allowance of Executor.—Where an executor incurred unnecessary expenses in the defense of a small claim, his allowance therefor will be limited to the taxable costs and disbursements.—*In re* Wick's Estate, 104 N. Y. Supp. 717.

76. EXECUTORS AND ADMINISTRATORS — Petition for Administration —Where all the parties interested in an estate joined in the petition for administration, the proceedings of the court were not void because of the failure of the court to bring interested parties before it by process, and the petitioning parties cannot collaterally attack them.—Otero v. Otero, Ariz , 90 Pac Rep. 601.

77. EXECUTORS AND ADMINISTRATORS—Universal Legatees.—Where plaintiffs, the legal heirs and universal legatees of decedent, claimed that her testamentary executor had invested certain moneys for her, which he had not accounted for, they had the burden of proof. —Succession of Hough, La., 44 So. Rep. 190.

78. FIRE INSURANCE—Tender.—Where an insurer denied liability on several fire policies, and tendered the unearned premium as to all and liability was established as to some of them the tender was good as to that policy on which it was not liable.—Ætna Ins. Co. v. Mount, Miss., 44 So. Rep. 162.

79. FORGERY—False Writing.— To constitute forgery there must be a false writing or a teration of an instrument, the instrument as made must be apparently capable of defrauding, and there must be an intent to defraud. —Goodman v. People, Ill., 81 N. E. Rep. 830.

80. FRAUDS, STATUTE OF—Oral Undertaking.—Equity will not permit the statute of frauds to be invoked in favor of a party who has not performed his oral undertaking against one who, at his invitation and in reliance on his promise, has expended money and changed his situation.—Atchison, T. & S. F. Ry. Co. v. Hurley, U. S. C. C. of App., Eighth Circuit, 153 Fed. Rep. 503

81. FRAUDS, STATUTE OF—Parol Contract.—A parol contract between joint owners of real property, whereby one is to bid at a public sale thereof for the benefit of all, is valid.—Griffin v. Schlenk, Ky., 102 S. W. Rep. 837.

82. GARNISHMENT— Pendency of the Garnishment.— Where plaintiff answered in an action, and garnishment proceedings were pending against her in another action action at the same time, and did not set up the pendency of the garnishment proceedings as a defense, and judgment was rendered against her, she is bound by the judgment.—Collier v. Allen, Ga., 57 S. E. Rep. 691.

83. GIFTS—Reconveyance.—In an action to cancel a deed of reconveyance, evidence held sufficient to sustain a finding that it was intended to vest title in the defendant in case of his recovery from a sickness he had at the time of the conveyance to plaintiff.—Le Brun v. Le Brun, Oreg., 90 Pac. Rep. 584.

84 GUARDIAN AND WARD—Compensation of Guardian. —A guardian held properly allowed to remain in suit brought by him, after ward attained majority and was joined as a party, and to have his compensation allowed therein.—Trustees of Elizabeth Speers Memorial Hospital v. Makibben's Guardian, Ky., 102 S. W. Rep. 820.

85. HABEAS CORPUS—Arrest in Civil Action.—It was no defense to an arrest in a civil action that plaintiff had previously sued on the same claim and arrested petitioner, and thereafter voluntarily discharged him on the same day for a consideration.—*Ex parte* Morton, Mass., 81 N. E. Rep. 869.

86. HOMESTEAD—Paying Debts of Ancestors.—Heirs to whom a homestead descends on the death of their ancestor may undertake to pay the debts of the ancestor, and may give a lien on the property to secure them.— Adams v. Bartell, Tex., 102 S W. Rep. 779.

87. HOMICIDE—Conspiracy.—Where defendants killed a prison guard while attempting to escape custody pursuant to a conspiracy, all were guilty of murder in the first degree.—State v. Vaughan, Mo., 102 S. W. Rep. 644.

88. HOMICIDE— Defense of Another.—One believing another to be in danger of losing his life, or suffering great bodily harm, has the same right to defend such other as the latter would have to defend himself.—State v. Hennessy, Nev., 90 Pac. Rep. 221.

89. HUSBAND AND WIFE—Antenuptial Contracts.—Antenuptial contracts should be liberally construed to

carry into effect the intention of the parties, without regard to the strictly technical meaning of the words used.—Collins v. Bauman, Ky., 102 S. W. Rep. 815.

90. HUSBAND AND WIFE—Conversion of Wife's Separate Estate.—Where a husband converts the wife's separate estate into money or other property and appropriates that to the benefit of himself or to the benefit of the community, he is liable to the wife or to her estate or heirs for its value.—Tison v. Gass, Tex., 102 S. W. Rep. 751.

91. HUSBAND AND WIFE—Conveyance of Real Estate.—A married woman is not a proper party defendant to a bill for specific performance of a parol contract for the conveyance of real estate by the husband, in which the wife only has a contingent interest.—Taylor v. Mathews, Fla., 44 So. Rep. 146.

92. INDICTMENT AND INFORMATION—Count on Information.—A count in an information charging the unlawful sale of intoxicating liquor, and that defendants were the keepers of a nuisance, held not bad as charging the commission of three separate offenses.—State v. Giroux, Kan., 90 Pac. Rep. 249.

93. INJUNCTION—Enforcement of Rights.—Where defendant shows the necessity for equitable remedies for the enforcement of his rights to the excess between two demands, in suit equity will enjoin the prosecution of suit at common law, and cause the parties to litigate in a court of equity.—Butler v. Holmes, Ga., 57 S. E. Rep. 715.

94. INTOXICATING LIQUORS—Authority to Issue License.—Where authority to issue licenses has been taken away from a town by a parish election, a license from the town is no protection against prosecution for selling without a license.—State v. Laborde, La., 44 So. Rep. 156.

95. INTOXICATING LIQUORS — Dramshop Act. — The dramshop act held violated by the dispensing without profit by a *bona fide* social club to its members of intoxicating liquors.—South Shore Country Club v. People, Ill., 81 N. E. Rep. 805.

96. INTOXICATING LIQUORS—License.—Where intoxicating liquor is sold as a beverage or kept under circumstances making the place a public nuisance, whether the defendants have a druggist's license is immaterial.—State v. Giroux, Kan., 90 Pac. Rep. 249.

97. JUDGES—Power of Judge to Attach Signature.—A former county judge had no power to attach his signature to an order in a case heard by him, after the term at which it was heard had adjourned and his term of office expired, even though it was done pursuant to an order of the court.—Waite v. People, Ill., 81 N. E. Rep. 887.

98. JUDGMENT—Action On.—Where it is made to appear that a second judgment may be in any respect more available than the first, an action on it may be maintained regardless of whether the judgment sued on is dormant or not.—City of San Antonio v. Routledge, Tex., 102 S. W. Rep. 756.

99. JUDGMENT — Affirmance of Judgment. — Where a judgment was affirmed on appeal, it was conclusive as between the parties and not subject to correction at special term for the purpose of allowing a credit for certain alleged payments.—Ferguson v. Bien, 104 N. Y. Supp. 715.

100. JUDGMENT—Decree.—Where it appears on the face of the record that a judgment or decree is void for want of jurisdiction, it is the court's duty to vacate it on the application of a party directly interested at any time subsequent to its rendition.—Sweeney v. Tritsch, Ala., 44 So. Rep. 194.

101. JUDGMENT—Omission of Property.—The omission of property from taxation in a given year held a single cause of action, and, where a judgment has been rendered in an action to assess it, the judgment is a bar to another suit to assess other property omitted from the same assessment.—Commonwealth v. Bacon, Ky., 102 S. W. Rep. 839.

102. JUDGMENT — Relief.—That a party may have obtained a judgment against another does not estop him to subsequently ask for the same kind of relief against the same party if conditions have changed.—State v. City of Leavenworth, Kan., 90 Pac. Rep. 237.

103. JUDGMENT—Service of Process.—Where a tax judgment recited that due service of process was made, the presumption of jurisdiction was not overcome by any defects in the record, such as a defective affidavit for service of the notice and summons by publication.—Peterson v. Investor's Trust Co., Wash., 90 Pac. Rep. 596.

104. JUDGMENT—Unconstitutionality.—It is not a good objection to an attack on a statute for unconstitutionality for given reasons that the same statute has been held not to be unconstitutional for another reason.—Hall v. Tarver, Ga., 57 S. E. Rep. 720.

105. JURY—Prosecution of Bank Officer.—In a prosecution of certain bank officers for conspiracy to defraud the bank, certain jurors who had had financial dealings with the bank, but who were not biased or prejudiced against defendants, held not disqualified.—Imboden v. People, Colo., 90 Pac. Rep. 608.

106. LANDLORD AND TENANT—Lessor of Property.—A lessor of property by a lease which was recorded and assignable without his consent is not entitled to a cancellation of such lease as against an assignee in good faith because of any transactions between the original parties of which the assignee had no knowledge or notice.—Hubbard v. Cook, U. S. C. C. of App., Ninth Circuit, 153 Fed. Rep. 554.

107. LANDLORD AND TENANT — Oral Lease.—A tenant under an oral lease of premises for one year at a stated monthly rental held a tenant from month to month, who, after legal notice to quit, held over unlawfully.—Mades v. Rowaldt, Wash., 90 Pac. Rep. 588.

108. LANDLORD AND TENANT—Permission to Sublet Premises.—Where the landlord's permission to sublet authorizes the subtenant to carry on a particular business, the landlord cannot complain that the insurance on adjacent property may be thereby advanced.—Dodd v. Ozburn, Ga., 57 S. E. Rep. 701.

109. LIBEL AND SLANDER—Admission of Evidence.—In an action for publishing an article charging plaintiff with theft, it was proper to refuse to admit evidence to show that plaintiff had been indicted for misdemeanors several times; none of the indictments having charged plaintiff with theft.—Register Newspaper Co. v. Stone, Ky., 102 S. W. Rep. 800.

110. LIBEL AND SLANDER—Publication of Libel.—There can be no award of punitive damages for the publication of a libel except upon proof either of actual malice, or that the libel was recklessly or carelessly published by the defendant.—Butler v. Gazette Co., 104 N. Y. Supp. 687.

112. LIMITATION OF ACTIONS—Defense of the Statute.—Where a petition fails to state a cause of action, an amendment asserting a cause barred by limitations does not deprive defendant of the defense of the statute.—Powers v. Badger Lumber Co., Kan., 90 Pac. Rep. 254.

113. MALICIOUS PROSECUTION—Probable Cause.—To justify an action for malicious prosecution, it must be shown not only that there was a lack of probable cause for the criminal prosecution complained of, but that it was instigated maliciously.—Van Meter v. Bass, Colo., 90 Pac. Rep. 687.

114. MANDAMUS—Compulsion to Pay Judgment.—*Mandamus* held to lie to compel the city of San Antonio to pay off a judgment rendered against it, and to exercise the power conferred by law to raise money to discharge it.—City of San Antonio v. Routledge, Tex., 102 S. W. Rep. 756.

115. MARRIAGE—Presumption of Validity.—Where the presumption of the validity of a marriage arising from the performance of the ceremony conflicts with the presumption of the continued life of a former spouse of one of the parties, the presumption of the validity of the second marriage will prevail.—Murchison v. Green, Ga., 57 S. E. Rep. 709.

116. MASTER AND SERVANT—Assumed Risk.—A servant, going outside of the duties of his employment, and attempting to fix a defective latch on a scraper, held to have assumed the risk of injuries resulting from so doing.—International & G. N. R. Co. v. Hall, Tex., 102 S. W. Rep. 740.

117. MASTER AND SERVANT—Assumption of Risk.—A large machine used for punching holes in iron or steel plates held not within the rule applicable to simple and ordinary tools that a servant assumes the risk arising from defects therein.—Modern Frog & Crossing Works v. Fries, Ill., 81 N. E. Rep. 862.

118. MASTER AND SERVANT—Directions by Train Master.—Directions by a railroad's train master in a school for instruction, persisted in for four years, that train crews should take the local operator's word as to the movements of trains, held sufficient to establish a general custom superseding a rule requiring all train orders to be in writing.—McCarthy v. Pennsylvania R. Co., N. Y., 81 N. E. Rep. 770.

119. MASTER AND SERVANT — Injury to Employee.—Where an employee was injured by a brick falling from a scaffold, where it was the act of a fellow servant, and not a defect in the scaffold, that caused the brick to fall, plaintiff's contention that the scaffold was improperly constructed was of no avail.—Willis v. Thompson-Starrett Co., 104 N. Y. Supp. 668

120. MASTER AND SERVANT—Injury to Servant.—That defendant was the owner of a team by which plaintiff was injured by the alleged negligence of the driver was admissible to show that the team was being used in defendant's service at the time of the injury.—Sibley v. Nason, Mass., 81 N. E. Rep. 887.

121. MASTER AND SERVANT — Inspection of Mines.—Where the duty of inspecting a mine for gas is delegated to a certain servant while performing it, he is as to his co-workers a vice principal, irrespective of his ordinary duties.—Western Coal & Mining Co. v. Buchanan, Ark., 102 S. W. Rep. 694.

122. MASTER AND SERVANT—Liability of Master.—That a way selected by an employee in going to and from a water closet was more convenient than a safe way provided by the employer held not to relieve the employee from using the safe way.—Douglas v. Southern Pac. Co., Cal., 90 Pac. Rep. 538.

123. MASTER AND SERVANT— Negligence.—When the master gives a servant an order which it is the latter's duty to obey, his act of obedience will not be regarded as negligence *per se*, unless the danger of obeying the order is so glaring that no prudent man would have undertaken it.—St. Louis Southwestern Ry. Co. of Texas v. Schuler, Tex., 102 S. W. Rep. 783.

124. MASTER AND SERVANT—Negligence of Employee.—Where the defect in an iron rod, the giving way of which killed an employee, was patent, and it does not appear that it was decedent's duty to inspect, a recovery may be had unless he knew of the defect or by ordinary care in the discharge of his duties should have known it. Wood's Adm'x v. Davies County Distilling Co., Ky., 102 S. W. Rep. 813.

125. MASTER AND SERVANT—Responsibility of Master.—The knowledge of the assistant superintendent of a street railway company, charged with the duty of supervising the proper operation of cars, that a motorman was incompetent and would not be able to run a car properly, which knowledge was communicated to the superintendent, must be imputable to the company.—Cooney v. Commonwealth Ave. St. Ry. Co., Mass., 81 N. E. Rep. 905.

126. MASTER AND SERVANT—Responsibility of Master.—The timbermen in a mine, engaged in making and keeping the roof in a safe condition, held vice principals, for whose negligence in exploding a shot in the roof without notice to a driver, resulting in injury to him, defendant was responsible.—Donk Bros.' Coal & Coke Co. v. Thil, Ill., 81 N. E. Rep. 827.

127. MONEY PAID — Reasonable Expenditure. — One against whom the full amount of an express contract for funeral expenses has been recovered may recover from the decedent's estate such part of the contract price as would constitute a reasonable expenditure for the purpose.—Ruggiero v. Tufani, 104 N. Y. Supp. 691.

128. MORTGAGES—Proceeds on Mortgage.—One loaning on two mortgages, one by the borrower, the other by the one soliciting the loan, held entitled to first proceed on the mortgage.—Thackaberry v. Johnson, Ill., 81 N. E. Rep. 828.

129. MORTGAGES—Trust Deed.—In an action to have a sale of land under a trust deed declared void, it was immaterial whether the complainant was the principal debtor, or only a surety on the notes secured thereby.—Weyburn v. Watkins, Miss., 44 So. Rep. 145.

130. MUNICIPAL CORPORATIONS— Delinquent Assessments.—In a suit to collect a delinquent special assessment for a municipal improvement, the statutory 4 per cent. penalty should be computed on the amount of the recovery exclusive of the attorney fee.—English v. Territory, Ariz., 90 Pac. Rep. 631.

131. NAVIGABLE WATERS—Vested Rights.—Under B. & C. Comp. § 4042, the exercise of a right by the owner of upland to occupy land under water of a navigable stream for wharfage purposes becomes vested right.—Grant v. Oregon Navigation Co., Oreg., 90 Pac. Rep. 178.

132. PARTIES—Delay in Raising Question.—In an action to enforce the lien of a laborer of a subcontractor of a contractor for the construction of a railroad, the failure to make the contractor a party held waived by the railroad company by its delay in raising the question.—Jasper & E. Ry. Co. v. Peek, Tex., 102 S. W. Rep. 776.

133. RAILROADS—Accident at Crossing.—Where plaintiff's intestate was injured at railway crossing, recovery is not barred unless she failed to exercise such care as an ordinarily prudent person would exercise under like conditions and similar circumstances.—Chesapeake & O. Ry. Co. v. Wilson's Adm'r, Ky., 102 S. W. Rep. 81.

134. SALES—Action for Breach of Warranty.—In an action for breach of warranty, a note given for price is not incompetent because nonnegotiable, and because the matters pleaded by plaintiff would constitute a complete defense to it where defendant has sold it.—Robert Burgess & Son v. Alcorn, Kan., 90 Pac. Rep. 289.

135. TAXATION—Redemption from Tax Sale.—The law allowing redemption from a tax sale does not contemplate that, if the purchaser at the tax sale had an independent title, the redemption should vest it in the defendant in the tax execution.—Elrod v. Owensboro Wagon Co., Ga., 57 S. E. Rep. 712.

136. USURY—Interest.—To constitue usury there must be an agreement on the part of a lender to receive and on the borrower to give for use of the money a greater rate of interest than 10 per cent.—Citizens' Bank of Junction City v. Murphy, Ark., 102 S. W. Rep. 697.

137. VENDOR AND PURCHASER—Mining Claim.—A party has a right to agree to sell one or more mining claims to which he has no title, and that he will convey a good and sufficient title upon the performance of stated conditions by the purchaser.—Donovan v. Hanauer, Utah, 90 Pac. Rep. 569.

138. WATERS AND WATER COURSES—Complaint by Landowner.—A complaint by landowners to compel a water company to deliver them a sufficient amount of water to properly irrigate their lands held demurrable as for a misjoinder of parties plaintiff and causes of action.—Creer v. Bancroft Land & Irrigation Co., Idaho, 90 Pac. Rep. 228.

139. WILLS—Codicil.—That a codicil is written upon the same piece of paper as a purported will, and that no other will is produced may be considered as tending to identify the purported will as the one referred to by the codicil.—*In re* Plumel's Estate, Cal., 90 Pac. Rep. 182.

140. WITNESSES — Impeachment.—If a witness is impeached in one particular, it is within the province of the trial court or jury to disregard his testimony on that account or on other points.—Sebree v. Rogers, Ky., 102 S. W. Rep. 841.